TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 142.

THE NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

WILLIAM H. WARD.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 4, 1877.

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1 *Declaration.—Filed Sept. 29th*, 1875.

In the supreme court of the District of Columbia, the 28th day of September, A. D. 1875.

THE NATIONAL SAVINGS BANK OF THE DISTRICT of Columbia
vs.
WILLIAM H. WARD.
} At law. No.

The plaintiff is a body corporate by virtue of an act of Congress approved May 24th, 1870, doing business in the District of Columbia, and the plaintiff sues the defendant in an action on the case; for that whereas before and at the time of the making of the promise and undertaking of the said defendant hereinafter next mentioned, to wit, on or about the 4th day of April, A. D. 1872, at the city of Washington, District of Columbia, the said plaintiff had contracted and agreed with one Leonard S. Chapman for a loan of the sum of three thousand five hundred dollars ($3,500) in current money to be made by the said plaintiff to the said Leonard S. Chapman, which loan was to be secured by a deed of trust upon certain tenements and premises, with the appurtenances, situate in the city of Washington, the same being lot numbered fifty-five (55) according to the said Chapman's recorded subdivi-
2 sion of square numbered three hundred and sixty-four (364) in said city, to which lot the said Chapman then assumed to have a fee-simple title, and to be able to execute a good and valid conveyance thereof; and thereupon heretofore, to wit, on or about the day and year aforesaid, at the said city of Washington, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there retained and employed the said defendant, who held himself out as an attorney-at-law specially employing himself in and about the examination of titles to real estate, and as specially skillful thereat as such attorney, for reasonable fees and reward to him in that behalf, to examine and ascertain the title of the said Leonard S. Chapman to the said tenements and premises with the appurtenances, and to report to the plaintiff the nature and extent of the said title he, said defendant, in consideration of said reasonable fees and reward, undertook to perform and fulfil his duty in the premises as such attorney and examiner; and the said plaintiff in fact saith that, confiding in the skill and integrity of the said defendant, afterwards, to wit, on or about the said 9th day of April, A. D. 1872, at the said city of Washington, the plaintiff did loan to the said Leonard S. Chapman the said sum of three thousand five hundred dollars ($3,500) in current money, upon the faith and credit of the report or abstract of title made by the said defendant as aforesaid in and about the said tenements and premises, and did accept from the said Chapman a deed of trust upon the said premises as security for the repayment of the said loan, the said defendant having reported the title of the said Leonard S. Chapman in and to the said tenements and premises good and unencumbered on said 9th day of April, A. D. 1872. And although it then and there became the duty of the said defendant, under and by virtue of the said retainer, to well and skillfully examine and ascertain the title of the said tenements and premises, and to report the same to the plaintiff, yet
3 the said defendant, not regarding his duty in that behalf, but contriving to injure tthe plaintiff, did not, or would not, so ex-

amine and ascertain the said title and report the true condition thereof, but hath wholly neglected so to do, and hath so negligently and unskillfully examined the said title that he hath reported the title of the said Leonard S. Chapman in and to the said premises and tenements good and unencumbered, whereas the plaintiff avers that at the time of the said examination and report and for some time previous thereto the said Leonard S. Chapman had no title whatever to the same; and the plaintiff avers that the said Chapman had previous to said examination and report, to wit, on or about the 13th day of March, A. D. 1872, sold and conveyed the said premises and tenements in fee to one Cornelia Beall, which deed was duly recorded in the office of the recorder of deeds for the District of Columbia, on said 13th day of March, A. D. 1872, and was properly entered upon the records of the said office. And the plaintiff avers that it has no knowledge of and did not discover the error and mistake so made by the said defendant as aforesaid until on or about the 14th day of November, A. D. 1873, when it was about to sell the said premises under the provisions of the said deed of trust. And the plaintiff avers that by reason of the said neglect of the said defendant in the premises, it has been damnified and hath suffered loss to the extent of ten thousand dollars. And the plaintiff further avers that the said Leonard S. Chapman was insolvent at the time of the discovery by the plaintiff of said negligence and improper conduct on the part of the defendant, and hath so continued. Wherefore the plaintiff sues the defendant for the said sum of $10,000.00, damages as aforesaid, and the costs of this suit.

And the plaintiff sues the defendant for this, that on or about the 4th day of April, A. D. 1872, at the city of Washington, District of
4 Columbia, the plaintiff had contracted with one Leonard S. Chapman to loan him the sum of $3,500.00 in current money for the period of one year from said date, with interest at the rate of ten per cent. per annum, the said loan to be secured by a deed of trust, to be executed by said Chapman upon lot 55 of Chapman's recorded subdivision of square 364 in the said city of Washington, which said lot the said Chapman pretended to be seized of in fee simple and to be able to execute a valid conveyance thereof; and the said plaintiff, having so contracted with the said Chapman, did, on the said 4th day of April, 1872, at the said city of Washington, retain and employ the defendant as an attorney at law, for a reasonable compensation to him to be paid, to examine and ascertain for the plaintiff the title of the said Chapman in and to the said lot. By reason whereof it became the duty of the said defendant, who held himself out to the public as specially skilled in the examination of titles, to correctly and carefully ascertain and report to the plaintiff the title of the said Chapman to the said lot. But the plaintiff avers that the said defendant so negligently and improperly conducted the said examination, that he reported to the plaintiff that the said Chapman had a good and unencumbered title to the said lot. And the plaintiff, relying on the said report so made by the said defendant, did, on or about the 9th day of April, 1872, loan the said sum of $3,500.00 to the said Chapman on the credit of said report. And the plaintiff avers that on the 13th day of March, 1872, the said Chapman had conveyed the said lot in fee to one Cornelia Beall, and that the conveyance to the said Beall was on record in the office of the recorder of deeds for the District of Columbia, on said 13th day of March, A. D. 1872; which error and negligence on the part of the defendant was not discovered by the plaintiff until on or about 1st day of November,
5 A. D., 1873, when the said Chapman was insolvent, as he hath

since continued to be. And the plaintiff avers that by reason of the said negligence and improper conduct of the defendant he hath been damnified and hath suffered loss to the extent of $10,000.00. Wherefore he brings this suit.

R. ROSS PERRY,
Attorney for Plaintiff.

The defendant is to plead on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

R. ROSS PERRY,
Attorney for Plaintiff.

Summons.—Issued Sept. 29, 1875.

In the supreme court of the District of Columbia.

THE NATIONAL SAVINGS BANK OF THE DISTRICT of Columbia, pl'ff,
vs.
WILLIAM H. WARD, DEF'T.
} No. 14699. At law.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring 20 days after service of this writ on you to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration. Witness, D. K. Cartter, chief justice.

[SEAL OF COURT]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Asst. Clerk,

R. R. PERRY.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

(On back:)

I hereby acknowledge service of copies of declaration, notice to plead, and this summons, this 29th Sept., 1875.

WM. H. WARD.

Plea of def't.—Filed Oct. 5, 1875.

Supreme court of District of Columbia.

NATIONAL SAVINGS BANK OF D. C.
vs.
WILLIAM H. WARD.
} At law. No. 14699.

The defendant says he is not guilty.

JOHN F. ENNIS,
JOHN J. JOHNSON,
Attorneys for Defendant.

Joinder of issue.—Filed Oct. 5, 1875.

Supreme court of District of Columbia, the 5th day of October, A. D. 1875.

THE NATIONAL SAVINGS BANK OF D. C. *vs.* WILLIAM H. WARD. } No. . At law.

The plaintiff joins issue with the defendant upon his plea in said case filed.

R. ROSS PERRY,
Attorney for Plaintiff.

6 *Notice of issue.—Filed Oct. 5, 1875.*

Supreme court of District of Columbia, the 5th day of October, A. D. 1875.

THE NATIONAL SAVINGS BANK OF D. C. *vs.* WILLIAM H. WARD. } At law. No. .

Last pleading filed this 5th day of October, A. D. 1875.

R. ROSS PERRY,
Attorney for Plaintiff.

To the CLERK.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, 16th day of October, A. D. 1876.

MONDAY, *October 16th*, 1876.

By order of Chief Justice Cartter, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

THURSDAY, *November* 9, 1876.

Session resumed pursuant to adjournment, Chief Justice Cartter, presiding.

THE NATIONAL SAVINGS BANK, PL'FF, *vs.* WILLIAM H. WARD, DEF'T. } No. 14699. At law.

Now comes here as well the plaintiff by its attorney, Mr. Perry, as the defendant by his attorneys, Messrs. Johnson & Bradley, and a jury of good and lawful men of this District, to wit, Cornelius Clark, William Sayer, William Crawford, Thomas R. Bierley, Alfred Pope, John J. Taylor, George A. Shekell, Thomas W. Chase, John Kehl, Evan Lyons, jr., James W. Colley, and Thomas R. Foot, who, being duly sworn to try the issue above joined; and after the plaintiff had rested its case, the defendant demurres to the plaintiff's evidence, and the same having been heard, the court sustains the demurrer, and directs the jury to find a verdict for the defendant; whereupon the jury on their oath say they find the issue aforesaid in favor of the defendant. Therefore it is

considered that the plaintiff take nothing by its suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defence, to be taxed by the clerk, and have execution thereof.

Supreme court of District of Columbia, the 11th day of November, A. D. 1876.

THE NATIONAL SAVINGS BANK OF D. C. *vs.* WILLIAM H. WARD. } No. At law.

And now comes the plaintiff in the above entitled case by its attorney, Mr. Perry, and moves the court that a new trial be granted to it by reason of errors of law specified in the exceptions taken therein to the rulings of the justice presiding at the trial thereof.

R. ROSS PERRY,
Attorney for Plaintiff.

7 *Bills of exceptions.*

Supreme court of District of Columbia.

NATIONAL SAVINGS BANK OF D. C. *vs.* WILLIAM H. WARD. } No. 14699. At law.

I.

At the trial of this cause the plaintiff, to maintain the issues on its part joined, offered evidence tending to prove that the defendant was, on and subsequent to the 4th day of April, A. D. 1872, an attorney-at-law, doing business in the city of Washington, District of Columbia, and holding himself out to the public as a person skilled in the examination of titles to real estate in the said District. That on or about the said 4th day of April, 1872, one Leonard S. Chapman employed the defendant in his professional capacity to examine and report upon his—said Chapman's—title to lot 55, according to Chapman's recorded subdivision of square 364, in the said city of Washington. That in pursuance of said employment the said Chapman was furnished by the defendant with the following certificate, to wit:

Lot 55, in Chapman's subdivision of lots in square 364.

The title of Leonard S. Chapman to the above lot is good, and the property is unencumbered.

WM. H. WARD.
ROBT. H. WARD.

4 APRIL, '72.

That this certificate was taken by the said Chapman to the firm of Dodge and Darneille, brokers, doing business as such in the said city of Washington, and they were employed by the said Chapman to negotiate a loan of $3,500 upon the said property, upon the faith of
8 said certificate. That the said brokers caused to be prepared and signed by the said Chapman the following note:

$3,500. WASHINGTON, D. C., *April 4th*, 1872.

One year after date I promise to pay to W. H. Thompson or order thirty-five hundred dollars, value received, with interest until paid at the rate of ten (10) per cent. per annum, payable at the National Metropolitan Bank.

L. S. CHAPMAN.

Residence, or place of business,
Due,
Secured by deed of trust, duly stamped.

Endorsement.

W. H. Thompson.—1872, Nov. 8, $175, interest to Oct. 4, paid.
1873, Apr. 8, 175, " " Apr. 4, "
1873, " 8, 175, " " Oct. 4, "

The said brokers also caused to be prepared and signed by the said Chapman and his wife a deed of trust, dated upon said 4th day of April, A. D. 1872, whereby the said lot 55, in square 364, was conveyed to the said broker, as trustees in trust to secure the payment of the said note when due. That the said brokers thereupon made application to the plaintiff, through its secretary and treasurer, Benjamin P. Snyder, who had charge of the negotiation of all loans made by the plaintiff, for a loan of $3,500, upon the security of the said note and deed of trust, and upon the faith of the said abstract made by the defendant as aforesaid. That the said Snyder required the said brokers to sign for the said Chapman the following paper, to wit:

WASHINGTON, *April* 8, 1872.

The undersigned hereby applies to the National Savings Bank of the city of Washington for a loan for the amount and upon the terms hereinafter set forth, said loan to be secured by a first deed of trust or lien, with power of sale, upon the real estate hereinafter described.

Amount of loan.—$3,500.

For how long.—One year.

Rate of interest.—Ten per cent., payable semi-annually.

9 Property to be deeded, where located. At Rhode Island ave. bet. 9 & 10 st. N. W., on lot 55, square 364.

Dimensions of land, by .

Nature of buildings thereon, whether stone, iron, brick, or wood. Brick.

Character of buildings, whether dwelling-house, store, factory, stable, &c. Dwelling.

Dimensions of building, by ; stories high, 3 & basement.

By whom and for what purpose now occupied, .

Estimated fair market value of land and building. s$7,000.

Assessed value for the year 187 . $.

Present rent obtained from land and buildings. $.

Amount of insurance now upon the buildings. $4,000.

In what office. Globe Insurance Company.

It is understood that the undersigned is to pay interest upon the amount of the above loan from the time when this proposal shall be accepted by the said bank; that the title to the above-mentioned real es-

tate is to be examined and the papers prepared by W. H. Ward, and the deed of trust to be recorded, all at the expense of the undersigned, and that no deeds of trust are taken by the said bank upon estates which are subject to condition, except when such condition was created by the city of Washington.

L. S. CHAPMAN,
By DODGE & DARNEILLE.

(Reference as to character and standing of applicant.)
(Place of business.)

Endorsement.

No. . Application of L. S. Chapman. Amount, $3,000. Estate, real. Approved W. S., Apl. 11, 1872, 1 C.

We estimate the actual cash value of the within described property at fifty-eight hundred dollars.

GEORGE H. PLANT,
Ch'm'n Com. Val.

That in accordance with the requirements of the said appication, the said brokers took the said certificate to have it extended to the date of the recording of the said deed of trust, which was done on the 9th day of April, A. D. 1872, by the direction of the said Snyder. That the said brokers thereupon returned to the said Snyder the said certificate with the following addition signed by one F. W. Jones, to wit:

10 There is no change since the above up to this 9th day of April, 1872, 2 o'clock p. m., except that the following deed has been recorded, viz:

L. S. Chapman et ux. to R. P. Dodge & P. A. Darneille.

April 4, 1872 (recorded April 9), trust to secure note for $3,500, at 1 year after date, interest at 10 per ct., payable to order of W. H. C. Thompson.

F. W. JONES,
Att'y at Law.
WM. H. WARD.

That thereupon the said Snyder refused to receive the said second certificate, and to make the loan upon the faith thereof, but required and directed the said brokers to procure the certificate of the defendant as required in said form of application hereinbefore set out. That in accordance with said direction and requirement of the plaintiff, the said brokers procured the certificate of the defendant as to the said title, by having him sign the certificate dated April 9th, next, hereinbefore set out. That thereupon the said certicates of April 4th, 1872, and April 9th, 1872, and the note and deed of trust hereinbefore set forth, were delivered by the said brokers to the plaintiff, who retained the said papers, and the sum of $3,500.00 was paid by the plaintiff to the said brokers' agents for the said Chapman, upon the security of the said deed of trust, and upon the faith and credit of the said certificates. That when the said note became due it was not paid; that the plaintiff attempted to enforce the said deed of trust by a sale of the premises thereby conveyed in trust as aforesaid in October, 1873, and then discovered that the defendant's certificates herein before set out were erroneous and

false. That the said Chapman and his wife had, on the 13th day of March, 1872, conveyed the said lot 55, in square 364, certified as aforesaid by the defendant, in fee simple to one Cornelia W. Beall, by deed duly executed and recorded on said 13th day of March, 1872, in the proper books of the office of the recorder of deeds of the District
11 of Columbia. That the plaintiff in and about the premises has expended the sum of $4,500.00, which sum has been totally lost to the plaintiff through the negligence of the defendant in making the said false and erroneous certificates.

The plaintiff further offered evidence, to wit, the annexed testimony of B. P. Snyder, Chas. G. Glover, B. H. Warner and P. A. Darneille, tending to prove that by general usage obtaining in the District of Columbia among those engaged in the borrowing and lending of money upon real estate security, an abstract or certificate of title is required to be furnished by the borrower to the lender, which abstract or certificate is retained by and is the property of the lender until the loan is paid; that by such usage the cost of such abstract or certificate is paid by the borrower, and that the attorney whose certificate will be satisfactory to the lender is designated by the lender. That this general usage is long established, well known, uniform and universal.

Whereupon the plaintiff rested.

And the defendant, to maintain the issues on his part joined, offered evidence tending to prove that the first certificate, dated April 4th, 1872, was made by the defendant's son, and that the defendant signed the same, but has no recollection of any of the circumstances attending the signing of either said first or second certificate. That the defendant was not employed by, and never came in contract with, either the plaintiff or the said brokers, so far as the transaction in question is concerned. That the said Chapman did not communicate to the defendant for what purpose he wanted the certificate; but that, unless a contrary opinion were expressed, he, defendant, would have supposed from the usual course of business, knowing Chapman to be the owner of the prop-
12 erty about to be examined, that the certificate was intended for the use of a prospective lender or purchaser. That the said Chapman never personally came in contact with the plaintiff, but only through his agents the aforesaid brokers; that the said Chapman got the proceeds of said loan from said brokers and paid for the said certificates. That the application to the said F. W. Jones for the extension of the first certificate from April 4th, 1872, to April 9th, 1872, was made by the said Chapman in person. Whereupon the defendant rested.

And thereupon the counsel for the plaintiff prayed the court to instruct the jury as follows:

If the jury shall find from the evidence that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such skilled examiner of titles aforesaid, by Leonard S. Chapman, to examine the title to the property in question, that as the result of said examination the defendant gave to the said Chapman, who paid him therefor, the two certificates in evidence, the defendant knowing that he thereby enabled the said Chapman to get credit from the public as the owner of the property so certified by the defendant to be the unencumbered property of the said Chapman; and if the jury shall further find that the plaintiff gave credit to the said Chapman upon the faith of the said certificate; then the jury are instructed as matter of law that these facts confer upon the plaintiff a legal right to maintain his action, although no contract relations existed between him and the defendant.

Which prayer the court refused to grant; whereupon the plaintiff then & there & before verdict excepted to the said refusal of the court to instruct as prayed, and prays the court to sign and seal this its first bill of exceptions, which is accordingly done nunc pro tunc this 29th day of December, A. D. 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

13 II.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

If the jury shall find from the evidence that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question; that as the result of said examination the said defendant gave to the said Chapman, who paid him therefore, the two certificates in evidence, knowing, or having reasonable cause to know, that the said Chapman procured the said certificates for the purpose of selling the said property or of negotiating a loan thereupon on the faith and credit of the said certificates; and if the jury shall further find that the plaintiff, acting upon the faith and credit of the said certificates, made a loan to the said Chapman upon the property named therein; then the jury are instructed, as matter of law, that the defendant is presumed to have contracted with the said Chapman in relation to said certificates as agent for an undisclosed principal, and the plaintiff has a legal right to maintain his action, although the jury should further find that the said loan had not actually been negotiated at the time the said certificates were made.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there, & before verdict, excepted thereto, and prays the court that this, his second bill of exceptions, may be signed and sealed; which is done accordingly nunc pro tunc this 29th day of December, 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

III.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

14 If the jury shall find from the evidence that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question; that as the result of the said examination the said defendant gave to the said Chapman, who paid him therefor, the certificate in evidence, dated April 4th, 1872, the said defendant having no knowledge of its intended use by the said Chapman; yet, if the jury shall further find that the defendant on the 9th day of April, 1872, gave the certificate of that date, read in evidence, and that said second certificate was procured at the instance of the plaintiff, although through the instrumentality of Chapman; and if the jury shall further find that the plaintiffs made the loan in evidence upon the faith and credit of the said two certificates; then the jury are instructed, as matter of law, that the

said second certificate was a re-affirmance by the defendant in favor of the plaintiff of the verity of said first certificate, even though the defendant did not know that the said Chapman in procuring the said second certificate was acting as the agent of the plaintiff, and the plaintiff has a legal right to maintain his action.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there, & before verdict, excepted thereto, and prays the court that this, his third bill of exceptions, may be signed and sealed; which is done accordingly this 29th day of December, A. D. 1876, nunc pro tunc.

[SEAL.] D. K. CARTTER,
Chief Justice.

IV.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

If the jury shall from the evidence that the defendant
15 held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that the said Chapman employed the defendant as such examiner to examine the title to the property in question, for the purpose of negotiating a loan thereupon; that as the result of said examination the defendant gave to the said Chapman, who paid him therefor, the certificate in evidence dated April 4th, 1872; that thereupon the said Chapman, through the agency of a broker, applied to the plaintiff for a loan upon the faith and credit of the said certificate, and further that the plaintiff caused the second certificate dated April 9th, 1872, to be made by the said defendant, and thereafter made the loan in evidence upon the faith and credit of the said two certificates; then the jury are instructed as matter of law that the plaintiff has a legal right to maintain his action, although the defendant was, so far as his knowledge extended, employed and compensated by the said Chapman.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there, & before verdict, eccepted thereto, and prays the court that this, his fourth bill of exceptions, may be signed and sealed; which is done accordingly nunc pro tunc this 29th day of December, 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

V.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

If the jury shall find from the evidence that there is an established usage obtaining in the District of Columbia, in connection with the borrowing and lending of money upon real estate security in the said District, to the effect that the certificate or abstract of title to such real estate, made by a professional examiner of titles, is the
16 property of the person who acts upon the faith and credit of the said certificate or abstract; and that by such usage, where the examiner is retained and paid by any other person than the one about to act on the faith and credit of such abstract or certificate, such other person is made the agent of the person so about to act; and if the jury

shall further find that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question; that as the result of said examination the defendant gave to the said Chapman, who paid him therefor, the two certificates read in evidence, dated, respectively, April 4, 1872, and April 9, 1872; that the plaintiff, acting upon the faith and credit of said certificates, made a loan to the said Chapman upon the security of the property mentioned therein, then the jury are instructed that as a matter of law the said certificates were the property of the plaintiff, and that the said Chapman acted as the agent of the plaintiff in procuring the said certificates, and that the plaintiff has a right to maintain his action against the defendant.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there, & before verdict, excepted thereto, and prays the court that this, his fifth bill of exceptions, may be signed and sealed; which is done accordingly this 25th day of December, 1876, nunc pro tunc.

[SEAL.] D. K. CARTTER,
Chief Justice.

VI.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

If the jury shall find from the evidence that the defendant
17 held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed and compensated as such to examine and report upon the property in question, and that as a result of his examination he gave the certificates in evidence dated respectively April 4, 1872, and April 9, 1872; and if the jury shall further find that on the 13th day of March, A. D. 1872, there was duly recorded, entered, and indexed upon the books of the office of the recorder of deeds of Washington County, District aforesaid, the deed in evidence from Leonard S. Chapman to Cornelia W. Beall, then the jury are instructed, as matter of law, that the defendant is guilty of such negligence as will render him liable to the plaintiff; provided they shall have previously found such facts as, under the instructions given, confer upon the plaintiff a right to maintain his action, and provided also that they shall further find that the plaintiff was injured by such negligence.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there & before verdict excepted thereto, and prays the court that this, his sixth bill of exceptions, may be signed and sealed; which is done accordingly, nunc pro tunc, this 25th day of December, 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

VII.

And thereupon the plaintiff further prayed the court to instruct the jury as follows:

If the jury shall find for the plaintiff, then in estimating the amount of damages proper to be assessed in his favor against the defendant, they shall take into consideration such sums of money as they shall be

satisfied from the evidence were lost to the plaintiff in immediate
18 consequence of the defendant's negligence and unskillfulness in the premises, and they shall include in this estimate not only the sum lent to the said Chapman on the faith and credit of the said certificates, but also such expenses of advertising and court costs as the plaintiffs have been subjected to in attempting to enforce their legal claims against the said Chapman and the said defendant arising out of the said loan.

Which prayer for instruction to the jury being refused by the court, the plaintiff then & there & before verdict excepts thereto, and prays the court that this, his seventh bill of exceptions, be signed and sealed; which is done according nunc pro tunc this 29th day of December, 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

VIII.

And thereupon the defendant, by his counsel, prayed the court to instruct the jury that, upon the whole evidence, they must find a verdict for the defendant, which prayer the court granted, and accordingly instructed the jury to find a verdict for the defendant; to which instruction the plaintiff then & there & before verdict excepted, and prays the court to sign and seal this, its eighth bill of exceptions, which is accordingly done nunc pro tunc this 29th day of December, A. D. 1876.

[SEAL.] D. K. CARTTER,
Chief Justice.

Appended testimony made part of first exception.

The plaintiff offers to prove that by the general usage in the city of Washington, District of Columbia, the certificate or abstract of title to real estate in the said District, made by a title examiner, is the property of the person who acts on the faith and security of the said
19 certificate or abstract; and that by such usage, when the examiner is retained and paid by any other person than the one about to act on the faith of said certificate, such other person is made the agent of the person so about to act.

To which offer the defendant objects.

The COURT. I will hear the testimony with a view of enlightening the question that we have to settle, subject to the adoption or rejection of it afterwards. I will not pass upon its competency at this time, but will hear it, subject to objection, with a view to being advised and giving the parties the benefit of the proof.

BENJAMIN P. SNYDER.

By Mr. PERRY:

Q. Are you acquainted with the usage obtaining among those engaged in borrowing and lending money in this district?

A. I believe so.

Q. State what that usage is with reference to the certificate of title made by an examiner of the property on which money is about to be loaned; to whom does that belong?

A. As I understand the general practice is that the certificate is secured by all parties loaning money, showing the title to be clear and unencumbered. As a rule, we very seldom ever deal with the property;

it is always through the agent of the property, either through a broker or through some friend, and the practice is always that they shall obtain from some attorney selected by the party loaning the money a certificate of title. The attorney is always selected by the party loaning the money, unless there happened to be a certificate already made, that is offered, and which is satisfactory to the party loaning the money. That certificate of title is then filed with the papers and retained until the loan is finally settled. Then, if the party who loaned the money has no
20 further interest in it, he surrenders it, if asked for it, of course.

We have to-day many certificates lying in our vaults. That is the general practice, as I understand it. I do not know of any one that loans money differently. I have known a great many different parties loaning money, private individuals, bankers and brokers, but that seems to me to be the rule. I judge so from my observation and from personal contact with people.

Q. You never loan money without the certificate?

A. No, sir; never.

Q. So far as you know, is money loaned on real estate without a certificate of title?

A. I never heard of it.

Q. How long have you known this usage?

A. To the best of my knowledge, five of six years. I understand that has always been the practice before that.

(Plaintiff offers in evidence the application for a loan of $3,500, dated April 8, 1872, signed L. S. Chapman, by Dodge & Darneille; the rate of interest to be ten per cent.; time, one year; location of property, lot 55, square 364, on Rhode Island avenue, between Ninth and Tenth streets.

Plaintiff also offers in evidence the abstract of title to the above-mentioned property showing title free and unincumbered, said abstract being signed by the defendant.

Plaintiff also offers in evidence a trust deed in the usual form, signed by L. S. Chapman and wife, and recorded on the 9th of April, 1872, conveying the above-mentioned property in trust to secure a note of $3,500.)

Cross-examination by Mr. BRADLEY:

Q. Please state to the court and jury a little more particularly the inception of this contract. I see the note is dated April 4th; do you recollect what occurred about that time?

21 A. I could not tell you. I only know that fact, that in the usual course of business Mr. Darneille came to me and applied for the loan; made inquiry if we had any money to loan on real estate; he said he had excellent property and excellent security offered. I told him yes.

Q. Had he any note or deed of trust with him at the time?

A. I could not answer that; I judge he had, from the fact of its being antedated.

Q. If the note and deed of trust were dated on the 4th of April, how comes it that the application was dated on the 8th, four days afterwards?

A. That is the usual thing. Sometimes we have an application that lies on hand two or three weeks until it is passed on by the board; we make no loans that are not first passed upon by the board.

Q. Is not the formal application in writing required by you as soon as a loan is applied for; is not that your regular practice?

A. It may be, and may not.

Q. Have you no practice about it?

A. We have this practice——

Q. If I come to your bank and say, "Mr. Snyder, I want $5,000 on such a piece of property; I have here a note and deed of trust as security," would you not say, "The party must make a formal application; here is a form"?

A. I do not always tender a form; sometimes I do, and sometimes I do not. You might come to me to-day and say you wanted so much money on this note and that deed of trust as security; I would say to you "Our board don't meet until next Wednesday; come in any time before that and I will give you a form."

Q. But you must sign this formal application; that is required?

A. Always.

22 Q. If the application was made on the 4th of April, and the certificate was dated at the same time, was not that left with you at the same time?

A. I could not answer that.

Q. Do you recollect when that came into your hands?

A. I think on the morning that we paid the money; I am not positive.

Q. That was about the 9th?

A. That was on the 11th, I think; I am not positive.

Q. After you got Mr. Jones' certificate and Mr. Ward's that the title was clear from the 4th of April to the 9th of April——

A. We did not know Mr. Jones in the transaction at all; we only knew Mr. Ward.

Q. Did you ever see Mr. Ward about it?

A. No, sir.

Q. Had you no conference with him at all?

A. No, sir; it is not the custom; we very seldom ever see an attorney, unless it is to hurry him up.

Q. Did your bank ever pay him anything for his services?

WITNESS. Directly?

Mr. BRADLEY. Yes.

A. No, sir, not directly; we very seldom ever do.

Q. You do not know that you paid anything indirectly?

A. I presume——

Q. It will not do for you to presume; what did your bank do? that is the question.

A. I do not know what became of the money.

Q. So far as you know, you did not separate any money from the loan to Mr. Chapman and pay that amount so separated to Mr. Ward?

A. No, sir; it is not the custom to do that.

Q. In this particular case, if I understand rightly, Mr. Darneille applied to you for a loan of money for Mr. Chapman, and your im-

23 pression is that you said, "You must make regular application to be laid before the board," and you do not recollect whether he showed you at that time a note and a deed of trust prepared or not; but afterwards he did file a written application dated April 8, and said, "Mr. Ward is to make the examination of title"?

A. Yes.

Q. And on the 11th of April, if I understand you correctly, you discounted this note, dated April 4th, for $3,500, on the faith of the certificate executed by Mr. Ward?

A. Yes, sir.

Q. You had on the 8th required Mr. Ward to certify, and he did so on the 9th; an interval had occurred between the 4th and 9th of April;

now did Mr. Chapman say to you that he would bring it to you; you did not apply to Mr. Ward or have any connection with him at all?

A. I did not see Mr. Ward in this transaction at all.

Q. What knowledge have you of the usage and custom among other bankers, brokers, or money lenders?

A. I have had conversations with them and seen their practice.

Q. Have you any knowledge of the transactions of others?

WITNESS. When such things have occurred?

Mr. BRADLEY. Yes.

A. Yes, sir; I could not particularize, but I have a knowledge of it.

Q. Are not most of such negotiations private?

A. Not necessarily so.

Q. Can you recollect a single case with other bankers or brokers, the facts of which are within your knowledge?

24 A. I don't know that I can; but I am positive of this, that I have seen such transactions and been present when they occurred.

Q. What I want to get at is, whether you know of a single case of a banker or broker in the city, from your duties in the bank and dealings in business?

A. I could not state any particular case.

Q. Are you aware of any concert of action among bankers and brokers or lenders of money in regard to this practice—any connection or agreement among them?

A. I think not.

Q. Is there any such in point of fact, so far as you know?

A. I don't exactly understand what you mean; where there is an organization required?

Q. Not an organization; but they may go round among each other and get together and say, "I will do such and such if you will"; there is nothing of that kind, so far as you know?

A. I do not know of any.

Q. Does not every banker and broker or money lender lend his money upon his own terms and in his own mode, and does he not require such evidence of title as he sees fit?

A. I don't know that that is usual; I should judge that to be the case; I don't know it.

Redirect examination by Mr. PERRY:

Q. You say you have never known any case where money was loaned upon real estate without a certificate of title?

A. I never heard of it.

Q. Did you ever hear of a case where the certificate of title was not kept by the party who acted on the faith of it?

A. As a rule all the people I have dealt with have been very jealous of the certificate of title.

25 JOHN C. GLOVER sworn.

By Mr. PERRY:

Q. You reside in this city?

A. I do.

Q. What is your occupation?

A. Banker.

Q. What house are you connected with?

A. Riggs & Co.

Q. What position do you hold there?

A. I am a member of the firm.

Q. State whether or not you have particular charge of that department of that bank through which money is loaned.

A. I usually attend to the negotiation of all loans.

Q. State whether you have any knowledge of any usage existing among those who lend and borrow money, with reference to the furnishing of certificates of title to real estate on the security of which the loan is made.

A. We generally require the broker who negotiates the loan to furnish an abstract; we generally designate the examiner whose certificate we will take.

Q. That is something you always require?

A. We usually require that.

Q. That is usually required where money is loaned upon real estate?

A. Yes, sir.

Q. State whether or not as a matter of usage the person who lends the money is brought in direct contact with the man who makes the examination. Is it not, as a matter of fact, always done through the broker?

A. No, not in all cases; sometimes men make application directly to us, and then we usually require them to go to some examiner and get an abstract made; we never go to the examiner ourselves; I think we have never done so during the whole time we have been making loans.

26 Q. State whether or not, as a matter of usage, that abstract is made, is it not uniformly the property of and retained by the person who is going to act on the credit of it and make the loan?

A. We always retain the abstract until the loan is paid off; it is part of the papers.

Q. You always require it, and you always make the party who makes the application for the loan pay the expense of it?

A. Always.

Q. And you always retain it as your property until the loan is paid?

A. Yes, sir.

Q. Is that the uniform usage, so far as you know, among business men here?

A. So far as my knowledge goes, it is.

Q. What do you know of that custom being known among business men here? Is it generally known or not?

A. I think it is; persons making loans usually know the terms.

Cross-examination by Mr. BRADLEY:

Q. What is the extent of your knowledge as to the business of other bankers, brokers, and money lenders? Do you know anything about it, or is it only an impression you have derived from your business?

A. No, sir; I am acquainted with the custom of a great many bankers, and, as a matter of course, I know that they require pretty much what we do—the abstract to be filed with the papers.

Q. That would ordinarily be done in the course of business?

A. Yes, sir.

27 Q. But have you any knowledge of the fact that the abstract is filed or how the abstract is obtained by others? Have you any knowledge of how the abstract is obtained by the most of them

who loan money? Do you know anything about it except the practice of your own bank?

A. I know one or two banks who require just as we do.

Q. Are you brought in contact or connection with the attorney employed to examine the title?

A. Never; we never see him.

Q. You do not pay him anything?

A. No, sir.

Q. And do not see him?

A. We do not see him at all.

Q. You only say "I want you to get Mr. Bradley to examine the title; bring me Mr. Bradley's certificate of title, and then we will talk about it?"

A. Yes, sir.

Q. If I understand you correctly, so far as your knowledge goes, it is the habit of the lender of money to say "bring me the abstract of title made by some attorney and then we will let you know what we will do."

A. Yes, sir.

Q. And the party brings you the abstract of title which you file; that is a matter of contract between you and the borrower?

A. Yes, sir.

Redirect examination by Mr. PERRY:

Q. I suppose your bank makes very extensive loans during the year?

A. Yes, sir.

Q. Can you give some general idea about the amount of loans you make?

A. It amounts to a pretty large sum of money; we make a
28 great many loans—not for the bank proper, but for our customers who wish to invest their money in that way.

Q. So that your experience is wide and extended in that respect?

A. Yes, sir.

By Mr. BRADLEY:

Q. That is, with respect to your own transactions?

A. Yes, sir.

B. H. WARNER sworn.

By Mr. PERRY:

Q. Where do you reside?

A. In Washington.

Q. What is your business?

A. Real estate agent and broker.

Q. How long have you been engaged in that business?

A. About seven years.

Q. Have you had knowledge during that time, in connection with your business, of any usage prevailing among men engaged in borrowing and lending money, as to a certificate of title to be furnished when money is loaned upon real estate security?

A. That is always required.

Q. Is it, or not, the custom of the party who is about to lend the money, to designate the attorney who is to make the certificate of title?

A. Yes, sir; that is generally the custom.
Q. According to the custom, who pays for that certificate?
A. The borrower.
Q. Who retains it?
A. The lender retains the abstract.
Q. In your business is it, or not, the fact that you employ the attorney yourself in all cases? or is it not the fact in many cases that you do not come in contact with him?
29 A. In many cases I do not come in contact with him.
Q. If a man comes to you and says, "I have the certificate of Mr. Ward or Mr. Ashford; here it is;" would you or not take that certificate and get a loan on it?
A. Yes, sir.
Q. And when the loan is made you return the certificate to the person who borrows the money?
A. Yes, sir.
Q. Is this custom and usage to which you have testified a matter well known among the business men of Washington?
A. I suppose so; it is to me.
Q. Have you heard others speak of it, or do you know of their acting upon it?
A. Oh, yes.
Q. Give us some idea of the extent of your business in this respect—the number of loans you make in a year. Do you not make a very large number?
A. Yes, sir.
Q. So far as your knowledge extends, that is the uniform custom?
A. Yes, sir.

Cross-examination by Mr. BRADLEY:

Q. The borrower, or the agent of the borrower, goes to the lender and says, "I have a certain piece of property upon which I want to get money for A B., and I have the certificate of title of such a person; here it is." Is that the custom or not?
WITNESS. Goes to the lender?
Mr. BRADLEY. Yes; the borrower goes or his agent goes.
A. Yes, sir.
Q. The borrower goes and says, I have piece of property on which I want to raise money. The title is good. Here is the certifi-
30 cate;" and upon the faith of that the transaction proceeds, and the application is received or rejected?
A. Yes, sir.
Q. The lender knows nothing of the man who is employed to make out the certificate, and has nothing to do with him so far as any contract between them goes?
A. No, sir.
Q. He takes it upon the certificate of title?
A. Yes, sir.
Q. If the borrower or his agent carries the certificate of title to his property that it is free and clear to the lender, and if the lender has confidence in the person who makes the certificate, he does not look any further; but if he has not confidence he says, "you must bring me the certificate of such a person as to the title." Is that not the custom?
A. That is the custom; yes.
Q. Will you say that that is the usual custom, or that that is the common course of dealing?

A. That is the common course of dealing.

Redirect examination by Mr. PERRY:

Q. Have you known of any exception to it? Have you known money being loaned on real estate security by brokers except upon the faith of the certificate of some examiner?

A. No, sir; I do not recollect of any case.

Q. Is not that certificate always retained by the party who loans the money?

A. Yes; certainly.

Q. You know no exception?

A. I do not remember any. I suppose there are some exceptions.

By Mr. JOHNSON:

31 Q. Do you not yourself sometimes order examinations?

A. Oh, frequently.

* * * * * *

P. A. DARNEILLE.

* * * * * * *

By Mr. PERRY:

Q. You have heard this testimony in regard to usage by the other brokers who have testified. State whether or not you can corroborate it?

A. You had better ask me questions about it.

Q. Are you or not acquainted with any usage existing among those engaged in loaning money in the District of Columbia, as to the requirement of an examination of title by some competent attorney, as to the real estate on which the money is about to be loaned?

A. Well, yes; parties loaning money want an examination of title.

Q. Who names that attorney?

A. They may have an attorney themselves, or if you have abstracts of title or writings made with which they are satisfied, they take that.

Q. Who pays the expense of that when it is made?

A. The party who borrows the money.

Q. Who retains the certificate or abstract?

A. The party who loans the money.

Q. Has that custom been uniform so far as your knowledge extends?

A. Yes.

Q. And well known?

A. That is my idea; I think so.

Cross-examination by Mr. BRADLEY:

Q. Had you anything to do with Mr. Ward in this matter?

32 A. I don't recollect of having anything to do with Mr. Ward in any case.

Q. Mr. Chapman got the certificate and brought it to you?

A. Yes, sir.

Q. I see this note and deed of trust are dated on the 4th of April, 1872. The application is dated the 8th, but the money was not obtained until the 11th of April. If I understand you rightly, after you first made application and before you signed that paper, you and Mr. Plant went out and examined the property to see the value of it?

A. Yes, sir.

Q. That was satisfactory?

A. Yes.

Q. After you made that written application, I see a further certificate was made, dated 9th of April. Now the bank being satisfied with the value of the property, then wanted some certificate to show that at the time the loan was made the title was clear, and they required Chapman to get that?

A. I don't know whether I got that or Chapman got it. My memory is not clear as to that. I could not say intelligently.

Q. Mr. Fred. W. Jones was also employed to examine the title; at least the certificate offered in evidence, dated April 9, is signed by him. Do you remember having anything to do with him about it?

A. I do not; I may have.

Q. Is this usage you speak of uniform? Does not every money-lender, banker, or broker lend upon his own terms and judgment as to the value of the property and the soundness of the title?

A. As a general thing they do; yes.

33 Proceedings before the supreme court of the District of Columbia, in general term, commencing Monday, April 16, 1877. Present, Justices Olin, Wylie, Humphreys, and Mac Arthur.

MONDAY, *April 23d*, 1877.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter and Justices Wylie and MacArthur.

THE NATIONAL SAVINGS BANK, PL'FF,
vs.
WILLIAM H. WARD, DEF'T. } No. 14699. At law.

And now again come here as well the plaintiff as the defendant, by their respective attorneys; whereupon because it seems to the court here that there is no error in the record or judgment of the circuit court, it is considered by the court that said judgment be, and the same is hereby, affirmed with costs.

34 In the supreme court of the District of Columbia, the 26th day of April, A. D. 1877.

THE NATIONAL SAVINGS BANK OF THE
vs.
WILLIAM H. WARD. } At law. No. 14699. In error.

Know all men by these presents that we, The National Savings Bank of the District of Columbia, Benjamin P. Snyder, and Thomas R. Jones, are bound unto the above-named William H. Ward in the sum of one hundred dollars lawful money of the United States, to be paid to the said William H. Ward, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 26th day of April, A. D. 1877.

Whereas the above-named The National Savings Bank of the District of Columbia has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named The National Savings Bank of the District of Columbia shall prosecute its said writ of error to effect, and answer all damages and

costs if it shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[SEAL OF THE BANK.] WILLIAM STICKNEY,
President Nat. Sav. Bank.
B. P. SNYDER. [SEAL.]
T. R. JONES, [SEAL.]

Sealed and delivered in presence of—
C. E. WYMAN.

1877, April 26.—Approved.

D. K. CARTTER,
Chief Justice, &c.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The National Savings Bank of the District of Columbia, plaintiff, and William H. Ward, defendant, at law, No. 14699, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 26th day of April, in the year of our Lord 1877, and of the Independence of the United States the 101st.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To William H. Ward:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Colnmbia, wherein The National Savings Bank of the District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice should be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia, April 26, 1877.

D. K. CARTTER,
Chief Justice, &c.

Service acknowledged.

JOS. H. BRADLEY,
Att'y for Wm. H. Ward.

30 APR., '77.

36 CLERK'S OFFICE,
Supreme Court of the District of Columbia, ss:

I, Return J. Meigs, clerk of said court, do hereby certify that the writings and printed matter annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this first day of May, A. D. 1877.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Ass't Clerk.*

(Indorsement on cover:) No. 142. The National Savings Bank of the District of Columbia, plaintiff in error, vs. William H. Ward. District of Columbia sup. court. Filed 4th May, 1877.

IN THE

Supreme Court of the United States.

No. 142—October Term, 1879.

THE NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

WILLIAM H. WARD, Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

R. ROSS PERRY,
Attorney for Plaintiff.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1879.

THE NATIONAL SAVINGS BANK,
OF THE DISTRICT OF COLUMBIA,
Plaintiff in Error,
vs.
WILLIAM H. WARD,
Defendant in Error.

No. 142.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

This is a writ of error to the Supreme Court of the District of Columbia.

The plaintiff in error brought its action in the court below against the defendant, to recover the sum of ten thousand dollars damages, alleged to have been sustained by it through the carelessness and negligence of the defendant in examining and reporting upon the title to certain real estate in the City of Washington, District of Columbia, specifically described in the declaration.

At the trial below the plaintiff offered the following evidence: On the 4th day of April, 1872, and prior thereto, the defendant, William H. Ward, was an attorney-at-law,

practising as such in the said City of Washington, and holding himself out to the public as a person specially skilled in the examination of titles to real estate in the said District. On or about the said 4th day of April, 1872, one Leonard S. Chapman employed the defendant in his professional capacity to examine and report upon his, Chapman's, title to the said real estate. The defendant, in pursuance of this employment, gave to Chapman, who paid him therefor, the certificate (Record, p. 5) dated April 4th, 1872, wherein he certifies that Chapman has a good title to the said real estate, and that the property is not encumbered. This certificate was taken by Chapman to the firm of Dodge & Darneille, brokers, doing business in the said City of Washington, and they were employed by him to negotiate a loan of $3,500, upon the security of the property named in the said certificate. These brokers thereupon caused to be prepared and signed by Chapman a promissory note, dated April 4th, 1872, for the sum of $3,500, payable with interest at ten per cent. to one W. H. Thompson at one year from date, which note was endorsed in blank by the said Thompson. They also prepared and caused to be executed by Chapman and wife a deed of trust upon the said premises, of even date with said note, whereby the said real estate was conveyed to them, said brokers, in trust to secure the payment of the said note when due. Thereupon they made application to the plaintiff through its secretary, Benjamin P. Snyder, who was in charge of its loan department, for a loan of $3,500 upon the security of the said note and deed of trust, and upon the credit of the said certificate of title made by the defendant. Snyder required the brokers to sign Chapman's name to the paper, set forth on page 6 of the Record, which is the form signed by applicants to the said Bank for loans. It is explicitly stated in this paper that the title to the real estate offered as security must be certified by the defendant, and that the cost of this certifi-

cate and other customary expenses connected with the proposed loan are to be paid by Chapman. Further, Snyder required the certificate of title to be extended down to the 9th of April, 1872, when the negotiation of the loan was concluded, and the deed of trust to be recorded and entered upon the certificate. The brokers thereupon had the deed recorded and the certificate continued to said date by an attorney other than the defendant, and returned it so continued to Snyder, who refused to receive it, requiring them to procure the defendant's certificate. Accordingly, Chapman got from the defendant a second certificate (Record, p. 7), for which he paid; and the two certificates, with the note and the deed of trust, were delivered by the said brokers to Snyder, who retained the same, and paid the sum of $3,500 to them as Chapman's agents, upon the security of the said note and deed of trust, and upon the faith and credit of the said certificates. The note was not paid at maturity, and when, in October, 1873, a sale of the said premises was attempted to be made under the said deed of trust, it was discovered that the certificates were erroneous and false, the said Chapman and wife having, on the 13th day of March, 1872, by deed duly executed and recorded on that day, conveyed the real estate named in said certificates, in fee simple, to one Cornelia W. Beall. The plaintiff's loss, including the original loan, interest and expenses, has amounted to the sum of $4,500.00.

The plaintiff further offered evidence (Record, pp. 13–19), tending to prove that by general usage obtaining in the District of Columbia among those engaged in the borrowing and lending of money upon real estate security, an abstract or certificate of title is required to be furnished by the borrower to the lender, which abstract or certificate is retained by, and is the property of, the lender until the loan is paid; that by such usage the cost of said abstract or certificate is borne by the borrower, and that the attorney

whose certificate is to be procured is designated by the lender.

The testimony offered by the defendant was to the effect that he was not employed by, and never came in contact with, either the plaintiff or the brokers. That Chapman did not communicate to the defendant the purpose for which he wanted the certificates in question; but that, unless a contrary opinion were expressed, he (defendant) would have supposed from the usual course of business, knowing Chapman to be the owner of the property about to be examined, that the certificates were intended for the use of a prospective mortgagee or vendee. That the first certificate was, in fact, made by defendant's son, and that defendant signed both the first and second certificates, but has no recollection of any of the circumstances attending the said signing, but that he was paid by Chapman for both certificates *out of this very loan.*

The plaintiff thereupon offered the several prayers for instructions to the jury, embodied in bills of exceptions numbered from I to VII inclusive; these were refused by the court. The defendant then prayed the court to instruct the jury as is set forth in exception numbered VIII, which prayer was granted. These several refusals to instruct as prayed by the plaintiff, and the instruction as prayed by the defendant were excepted to by the plaintiff, and are the ground for these proceedings in error.

ASSIGNMENT OF ERRORS.

I. The court erred in ruling that some privity of contract, arising from an actual employment of the defendant by the plaintiff, was necessary to enable the plaintiff to maintain this action.

II. The court erred in holding that the evidence did not establish such privity of contract between the plaintiff and

the defendant as would enable the plaintiff to maintain this action.

III. The court erred in refusing to instruct the jury as to the legal effect of the usage proven in this case.

IV. The court erred in refusing to instruct the jury as prayed with respect to what facts would constitute such negligence on the part of the defendant as would entitle the plaintiff to recover.

V. The court erred in refusing to instruct the jury as to the proper measure of damages.

VI. The court erred in instructing the jury that upon the whole evidence the plaintiff was not entitled to recover.

ARGUMENT AND AUTHORITIES.

I.

The question presented by the first bill of exceptions, and embraced in the first assignment of error, is this: Is an attorney ever liable for negligence in the performance of his professional duty to a person who did not employ him to perform that duty, although such person is the immediate sufferer from said negligence?

The importance of this question becomes manifest when the evidence set forth in the Record, pp. 12–20, is considered. It appears, therefrom, that, according to the usual manner of making loans upon real estate in the District of Columbia, the lender rarely sees or has any communication with the attorney who examines the title of the property offered as security. Frequently, as in this case, the owner of the property himself procures the certificate of title, and with this applies either in person or through brokers to the capitalist; if the attorney giving the certificate is in good repute, the loan is made upon the faith of his certificate, al-

though there has been no communication of any sort between the lender and the attorney. It is matter of notoriety that loans upon the security of real estate are made more frequently than are sales thereof. If, therefore, the manner of making these loans is correctly stated in the testimony, the attorney giving a false certificate of title will, in the majority of cases, escape all liability on account of his negligence, provided the party injured is required to establish a privity of contract with the attorney in order to recover. The owner of the property, or the broker procuring the certificate, cannot sue, for neither has lost anything by the attorney's negligence; the only one who has been damnified is the lender, who has parted with his money upon the faith of the certificate.

It may be well to consider, as an argument *ab inconvenienti*, a practical result which will follow the establishment of the rule of privity in cases of this nature. All prudent purchasers of real estate procure, at considerable expense, certificates or abstracts of title to the property about to be bought. Many of them desire soon to borrow money upon the security of their real estate. They hold already the certificate of an attorney upon whom the lender is willing to rely; and yet, if privity be required, they are forced to pay again for virtually the same certificate from the same attorney, procured only for the purpose of establishing a privity of contract between the attorney and the lender; and this, although, as appears from the Record, the certificate of title is in every case, together with the note and deed of trust, delivered to and retained by the lender.

It is stated in the text of Shearman and Redfield on Negligence, § 215, that "the obligation of an attorney is to his client alone," and the authority quoted in support of the statement is—

Fish vs. *Kelly*, 17 C. B. (N. S) 194.

A perusal of this case shows that the court decided simply

that an attorney is not liable to an action for negligence for giving, in answer to a casual inquiry by a stranger, erroneous information as to the contents of a deed prepared by himself, he having forgotten the said contents and not intentionally misrepresenting them. The opinion of Earle, C. J., is based entirely upon the facts of that particular case, and concludes not only that there was no contract between the plaintiff and the defendant, but that the defendant owed no public duty to the plaintiff. He was questioned by the plaintiff, a stranger, as to a matter of fact, and he gave, gratuitously, an honest but mistaken answer. It is clearly intimated in the opinion of the court that, had he been acting as an attorney, he would have been liable for negligence to the person injured, not because of any contract, but because of his failure to perform his duty as a public officer.

The duty imposed by law upon an attorney, as a public officer, is in every respect identical with that charged upon a surgeon.

Vide Shearman and Redfield on Negligence.
c. XI on Attorneys aad Counsellors-at-Law.
c, XXIV on Physicians and Surgeons.

The case of *Pippin and Wife* vs. *Sheppard*, 11 Price, 400, decided in the year 1822, in the Exchequer, was this: The plaintiff and his wife sued the defendant, a surgeon, for an injury to the wife by reason of the defendant's improper and unskilful treatment. The declaration averred the profession of the defendant, and that he was retained and employed in his professional capacity, for a reward to be to him therefor paid, to treat the plaintiff's wife; that he entered upon the treatment; it then averred defendant's negligence and the consequent injury to the plaintiff's wife. The defendant demurred on the ground that the declaration did not aver by whom the defendant was retained and em-

ployed as such surgeon, nor did it aver that he was retained by the plaintiffs or either of them, or at their or either of their special instance or request. The court unanimously overruled the demurrer, and gave judgment for the plaintiff.

LORD CHIEF BARON RICHARDS, said:

"I am really at a loss to know how any declaration should be framed in this case so as to be right, if this be wrong. The defendant, being a surgeon, undertakes to the public to cure wounds and other ailments of the human system, and professes himself ready to be employed by any one for that purpose. The declaration states that he was, as a surgeon, employed for a reasonable reward to attend and cure this patient; that he entered on the treatment, &c. It is, therefore, I think, sufficiently stated that the defendant undertook the cure. Then negligence and improper treatment are charged, and the injurious effects of such misconduct are averred. The question then is, to whom was the injury done? If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, he would not be entitled to recover or sue for damage and injury done to her in consequence of the surgeon's negligence and want of skill. From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient, is the patient himself, for damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. *The party employing the surgeon can have nothing to do with this action.* I am, therefore, of opinion that the demurrer cannot be sustained, and that there must be judgment for the plaintiff."

GRAHAM, BARON, said:

"The plaintiffs are the only persons who could recover damages, or be entitled to demand them, for the injury complained of. That is the true test by which this question must be tried. In this case, it appears to me that there is a sufficient allegation that the defendant undertook

the cure, and that by his unskilful conduct the plaintiff's wife suffered an injury, and that is enough to support the action. Whatever cause of action other persons besides may happen to have, is, therefore, wholly out of the question."

GARROW, BARON, said:

"It would be of most mischievous consequence if this declaration could not be sustained. * * * * In cases of the most brutal inattention and neglect, patients would be precluded frequently from seeking damages by course of law, if it were necessary, to enable them to recover; that there should have been a previous retainer on their part, of the person professing to be able to cure them. In all cases of surgeons retained by any of the public establishments, it would happen that the patient would be without redress; for it could hardly be expected that the governor of an infirmary should bring an action against the surgeon employed by them to attend the child of poor parents, who may have suffered from his negligence and inattention; and are they to be without remedy, because they cannot get the names of the five hundred persons by whom the surgeon was employed to insert in their declaration? If we were to hold that such an averment were necessary, it would be holding out an encouragement to neglect and carelessness, by depriving parties of all remedy, in consequence of making it impossible that a declaration should be so framed as to be free from the objections raised by this demurrer."

The case of *Gladwell* vs. *Steygall*, 5 Bingham's New Cases, 733, decided in the Common Pleas in 1839, was this: the plaintiff, an infant ten years of age by her *prochein ami*, sued the defendant, a surgeon, in case. The declaration averred the defendant's profession, and that the plaintiff, at the special instance and request of the defendant, had employed the defendant, as surgeon, to cure her of a certain ailment, and that he undertook the cure. It then averred negligence and consequent damage to the plaintiff. A plea

was interposed by the defendant, to the effect that the plaintiff did not employ the defendant. A verdict was found for the plaintiff, and, upon a rule, *nisi*, obtained by the defendant to enter a verdict for him upon the said plea, the court held as follows:

TINDAL, C. J.:

"None but the plaintiff could sue for damages for the personal injury done to her; and the form of the traverse does not vary the extent of the defendant's duty. His duty would be the same, whether he were called in by the father or the child."

VAUGHAN, J.: "By whom the defendant was employed, I think is immaterial."

ERSKINE, J.: "It was not necessary to state in the declaration by whom the defendant was employed."

The rule was discharged.

An attorney, as also a surgeon, is liable for gross negligence where his services have been rendered gratuitously, and where, consequently, there is no privity of contract.

Donaldson vs. *Holdane*, 7 Clark & Finelly, 762;
McNevins vs. *Lowe*, 40 Illinois, 209.

The case of *George and Wife* vs. *Skivington*, Law reports, 6 Exchequer, 1, decided in 1869, was this: the plaintiffs, Joseph George, and his wife, Emma George, by their declaration, alleged that the defendant, in the course of his business, professed to sell a chemical compound made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, without causing injury to the person using it, and to have been carefully compounded by him; that the plaintiff, Joseph George, thereupon bought of the defendant a bottle of this hair wash to be used by the plaintiff, Emma George, as the defendant then knew, and on

the terms that it could be safely used, and had been carefully compounded. Breach, negligence in preparing and selling the wash, and consequent injury to the plaintiff, Emma George, who used it. It was held, on demurrer, that the declaration disclosed a good cause of action.

KELLY, C. B., said:

"The question is, whether an action at the suit of the plaintiff, Emma George, her husband being joined for conformity, will lie? It is contended that it will not. There was no warranty, it is said, either express or implied, towards the purchaser himself. But it is not necessary to enter into that question, because the contract of sale is only alleged by way of inducement, the cause of action being not upon that contract, but for an injury caused to the wife of the purchaser by reason of an article being sold to him for the use of his wife, and so sold to the defendant's knowledge, turning out to be unfit for the purpose for which it was bought. There is, therefore, no question of warranty to be considered, but whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it, whereby the person who used it was injured; and I think that, quite apart from any question of warranty, express or implied, there was a duty on the defendant, the vendor, to use ordinary care in compounding this wash for the hair. Unquestionably, there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased."

PIGOTT, BARON, said:

"Such an action by the purchaser himself is clearly maintainable. Then, where the thing purchased is for the use, not of the purchaser himself, but, to the defendant's knowledge, of his wife, does the defendant's duty extend to her? I can see no reason why it should not. * * * The case no doubt would have been very different if the declaration had not alleged that the defendant knew for whom the compound was intended. Suppose, for exam-

ple, a chemist sells to a customer a drug, without any knowledge of the purpose to which it is to be applied, which is fit for a grown person, and that drug is afterwards given by the purchaser to a child and does injury, it could not be contended that the chemist was liable."

CLEASBY, BARON said:

"No person can sue on a contract but the person with whom the contract is made; and this undoubted proposition was attempted to be taken advantage of in *Langridge* vs. *Levy*. The answer was that, admitting the proposition to be true, still a vendor who has been guilty of fraud or deceit is liable to whomsoever has been injured by that fraud, although not one of the parties to the original contract, provided at least that his use of the article was contemplated by the vendor. It was therefore held in that case that the boy who used the defective gun, and for whose use the defendant knew it was destined, had a good cause of action. Substitute the word "negligence" for "fraud," and the analogy between Langridge and Levy and this case is complete."

It will be observed that stress is laid in these opinions upon the fact that the declaration averred that the defendant knew both the purpose for which, and the person for whom, this hair dye was purchased; and this averment is spoken of as a necessary one in this particular case; the averment was necessary, for, as is illustrated in the opinion of Pigott B., certain drugs are useful for some purposes and deleterious for others; fatal, perhaps, to infants, and yet harmless or even beneficial to adults. It was therefore necessary to allege that the defendant sold as good hair-wash, an article which was not such to a person who could have used a proper wash without injury. To put any other interpretation upon the language of the court would be to subvert its unanimous decision that the action was for a breach of duty towards the wife, and not for a violation of the contract made with the husband. Suppose

that instead of hair-dye the chemist had negligently sold the husband some poison which could serve no purpose and which would injure any person using it, would it be contended that the wife injured by its use had no remedy, because the chemist was not informed that it was intended for her? How could his knowledge in such a case as that, with respect to the person about to use the article, have any effect upon his negligence? So in the case at bar, the knowledge by the defendant of the person about to use his certificates of title was immaterial. He was not more or less negligent on that account, nor does his act become more or less injurious by reason of the age of the person relying upon it. Those certificates of his were absolutely false; they could serve no useful purpose to any one—rather would they infallibly injure any person using them. To hold that the injured plaintiff must allege and prove that the defendant knew that he was the person about to use them, would be to deprive him of all remedy and to let the defendant's negligence go unpunished, for the plaintiff is the only person who can sue.

This view has been taken by the courts. In the case of *Norton* vs. *Sewall* 106 Mass, 143, decided in 1870, there was no allegation of knowledge on the part of defendant, as to the person about to use the drug purchased, or as to its intended use.

GRAY, J., said:

"Upon the allegations in the declaration, and the statements in the bill of exceptions, the jury must be taken to have found that the defendant, an apothecary, by his servant, negligently sold as, and for tincture of rhubarb (a well-known and harmless medicine), two ounces of laudanum, a dangerous and deadly poison, to Patten, who procured it for the purpose of administering it, and did administer one ounce of it as a medicine, to his servant, the plaintiff's intestate, from the effect of which he died. This

finding includes a violation of duty on the part of the defendant, and an injury resulting therefrom to the intestate, for which the defendant was responsible, without regard to the privity of contract between them. The case is within that of *Thomas* vs. *Winchester*, 2 Selden, 397; which has often been recognized and approved by this court."

In the case of *Davidson* vs. *Nichols*, 11 Allen, 514; the authorities (English and American) in point are ably reviewed, and the distinction is made as above indicated. It is one which is supported by sound reason and public policy, and is a logical development and consequence of the principles of law laid down in *George and Wife* vs. *Skivington*.

There is a class of cases analogous to those which have been considered, in which actions have been held to be maintainable against common carriers by persons who were not in privity of contract with them, for negligence and omission of duty.

The case of *Marshall* vs. *The York, &c., R. R. Co.*, 11 C. B., 655, decided in 1851, in the Common Pleas, was an action in case brought by a passenger against a railway company for the loss of his luggage; it was alleged in the declaration that the defendants received the passenger to be safely carried, together with his luggage, "for reward to the defendants in that behalf." It was then alleged that it was the defendants' duty safely and securely to carry the plaintiff and his luggage, and a breach of that duty was averred, whereby the luggage was lost. It was held by Jervis, C. J., and Williams, J. (who alone sat), "that the action being founded on the breach of duty and not on contract, it was not necessary to allege or prove that the reward was to be paid by the plaintiff, but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was traveling at the time; further, that if the allegation in the declaration

did impart that the payment was to be made by the plaintiff, the payment by the master on his behalf would be a payment by the plaintiff.

The case of *Collett* vs. *The London and North Western R. R. Co.*, 16 Q. B., 984, decided in 1851, was an action in case brought by the plaintiff, an officer of the Post-office, against the defendant, for damages resulting to his person from its negligence while he was being carried on one of its trains—he being on said train lawfully and by direction of the Postmaster General, under authority of law. Upon demurrer, it was held that it was the duty of the Company to use due and proper care and skill in conveying.

"That duty does not arise in respect of any contract between the Company and the person conveyed by them, but is one which the law imposes; if they are bound to carry, they are bound to carry safely." (Campbell, C. J., Patteson, Wightman, Erle, J. J.)

In the case of *Austin* vs. *The Great Western R. R. Co.*, the plaintiff, a child a little more than three years old, was taken by its mother on the defendant's railway, the mother having purchased a ticket for herself but none for the child, although by law children of that age were required to pay half-fare, The plaintiff was allowed to maintain his action against the defendant for injuries received by him while a passenger. Blackburn, J., said:

"The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the Company to carry him safely."

The case of *Martin* vs. *The Great Indian Rail. Co.*, Law Reports 3, Exchequer 9, decided in 1867, was this: The plaintiff, Martin, and his goods were carried by the defendant under a contract between the defendant and the Indian Government to carry certain persons, of whom

plaintiff was one, and his goods were destroyed by the negligence of defendant. It was held that the plaintiff could not sue the defendant for breach of contract, but that he was entitled to sue for an injury done to his property through their negligence, whilst the goods were in their custody.

There have been, it is conceded, English decisions inconsistent with those just quoted; the preponderance of authority is, however, in support of the position hereinbefore assumed. Says a most excellent author, after reviewing the two classes of cases:

"That the courts have not been quite consistent in the view they have taken of actions for torts founded on contracts, is, it is submitted, clear. But the difference of the views entertained in the different cases is less than it might at first sight appear; for though such cases as *Austin* vs. *Great Western Rail. Co.*, and *Marshall* vs. *York, &c., Rail. Co.*, treat the obligation of carriers as existing independently of contract, the decisions in these cases, and others like them, may be maintained on the ground taken by some of the judges, that a contract did exist between the plaintiff and the defendants—*i. e.*, that in the one case the master, and in the other the mother, contracted as agent for the plaintiff." *Dicey on Parties to Actions*, (Am. Ed.,) p. 400.

The case of *Philadelphia and Reading R. R. Co.* vs. *Derby*, 14 Howard, 484, is conclusive of the law in this tribunal. In that case it was held that a passenger on the said railway, himself a stockholder in the Company, riding by invitation of the President of the Company, paying no fare, and not in the usual passenger cars, was entitled to recover from the Company for injuries caused by a collision resulting from the gross negligence of the Company's servants.

It is submitted that the authorities quoted abundantly sustain the propositions of law contained in the plaintiff's

first prayer, and that it was error in the court below to refuse it.

If it be objected that the counts in the declaration are both founded upon contract, it may be answered:

1st. That the counts are in tort; the averments of contract being made only by way of inducement.

George vs. *Skivington*, 5 L. R. (Exchequer), 1.

2d. That the *gravamen* of both counts is a tortious breach of the defendant's duty as attorney, as well as of the implied promise arising from an employment for hire; each count contains allegations sufficient to support it, either in tort or assumpsit.

Church vs. *Mumford*, 11 Johnson, 479.

II.

The second assignment of error embraces exceptions numbered II., III., and IV. These will be considered in order.

a. The court was asked by the plaintiff to instruct the jury as follows:

If the jury shall find from the evidence that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question: that as the result of said examination the said defendant gave to the said Chapman, who paid him therefor the two certificates in evidence, knowing, or having reasonable cause to know, that the said Chapman procured the said certificates for the purpose of selling the said property or negotiating a loan thereupon on the faith and credit of the said certificates; and if the jury shall further find that the plaintiff, acting upon the faith and credit of the said certificates, made a loan to the said Chapman upon

the property named therein; then the jury are instructed, as matter of law, that the defendant is presumed to have contracted with the said Chapman in relation to said certificates as agent for an *undisclosed* principal, and the plaintiff has a legal right to maintain his action, although the jury should further find that the said loan had not actually been negotiated at the time the said certificates were made.

This prayer the court refused. The evidence on which it is based is found in the record, pp. 5 to 8, inclusive. In this case, Chapman procured the first certificate, intending to borrow money upon the credit thereof; the defendant testified that, knowing Chapman to be the owner of the property examined, he would have supposed that the certificate was intended for the use of a prospective lender or purchaser. This is the case, therefore, with respect to the first certificate of a contract made by an unauthorized agent on behalf of a principal who, although not such at the time of the making of the contract, becomes such by subsequent ratification. That this principal was not named at the time, or was, in fact, unknown to the person who intended to be the agent, is no objection to the rule.

Dicey on Parties to Actions, pp. 152–154;
Leake on Contracts, p. 269;
Watson vs. *Swann*, 11 C. B., (N. S.) 771;
Foster vs. *Bates*, 12 M. & W., 226;
Tharpe vs. *Stallward*, 5 M. & G., 760;
Ancona vs. *Marks*, 7 H. & N., 686;
Routh vs. *Thompson*, 13 East, 274.

b. The court was further asked by the plaintiff to instruct the jury as follows:

If the jury shall find, from the evidence, that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of

Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question; that, as the result of the said examination, the said defendant gave to the said Chapman, who paid him therefor, the certificate in evidence dated April 4th, 1872, the said defendant having no knowledge of its intended use by the said Chapman; yet, if the jury shall further find that the defendant, on the 9th day of April, 1872, gave the certificate of that date, read in evidence, and that said second certificate was procured at the instance of the plaintiff, although through the instrumentality of Chapman; and if the jury shall further find that the plaintiffs made the loan in evidence upon the faith and credit of the said two certificates, then the jury are instructed, as matter of law, that the said second certificate was a re-affirmance by the defendant in favor of the plaintiff of the verity of said first certificate, even though the defendant did not know that the said Chapman, in procuring the said second certificate, was acting as the agent of the plaintiff, and the plaintiff has a legal right to maintain his action.

This prayer the court also refused. It appears, from the evidence, that the second certificate was procured from the defendant at the direct instance, and pursuant to the instructions, of the plaintiff. Chapman, in this matter, was acting as the plaintiff's agent. Whether he disclosed the existence of the agency or not, is, in this case, immaterial; for it appears, from the testimony, that the defendant knew that both certificates were procured for the use of a prospective lender or purchaser.

Dicey on Parties to Action, p. 162;
Wheaton on Agency, § 405,
Semenza vs. *Brinsley*, 18 C. B., (N. S.) 467;
Phillips vs. *Wood*, 1 Neville & Manning, 434.

c. The plaintiff further prayed the court to instruct the jury as follows:

If the jury shall, from the evidence, find that the defendant

held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that the said Chapman employed the defendant as such examiner to examine the title to the property in question, for the purpose of negotiating a loan thereupon; that as the result of the said examination the defendant gave to the said Chapman, who paid him therefor, the certificate in evidence, dated April 4th, 1872; that thereupon the said Chapman, through the agency of a broker, applied to the plaintiff for a loan upon the faith and credit of the said certificate; and further, that the plaintiff caused the second certificate, dated April 9th, 1872, to be made by the said defendant, and thereafter made the loan in evidence upon the faith and credit of the said two certificates; then the jury are instructed, as matter of law, that the plaintiff has a legal right to maintain his action, although the defendant was, so far as his knowledge extended, employed and compensated by the said Chapman.

This prayer, which was also refused, is substantially a repetition of that immediately preceding, with an additional clause as to the legal effect of the fact that the defendant's compensation was paid by Chapman. It has been held that it is immaterial by whom the compensation is paid. That is a matter between the principal and his agent. In this case the defendant was paid out of the proceeds of the very loan made on the credit of his certificates.

Pippin and wife vs. *Sheppard*, 11 Price, 400;
Gladwell vs. *Steggall*, 5 B. N. C., 733;
Marshall vs. *York, &c., R. R. Co.*, 11 C. B., 655;
Page vs. *Trutch*, 5 Am. Law Record, 155.

III.

The third assignment of error is based upon the refusal of the court to instruct the jury as set forth in exception numbered V. The words of the prayer are as follows:

If the jury shall find, from the evidence, that there is an established usage, obtaining in the District of Columbia, in connection with the borrowing and lending of money upon real estate security in the said District, to the effect that the certificate or abstract of title to such real estate, made by a professional examiner of titles, is the property of the person who acts upon the faith and credit of the said certificate or abstract; and that, by such usage, where the examiner is retained and paid by any other person than the one about to act on the faith and credit of such abstract or certificate, such other person is made the agent of the person so about to act; and if the jury shall further find that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed as such by Leonard S. Chapman to examine the title to the property in question; that, as the result of said examination, the defendant gave to the said Chapman, who paid him therefor, the two certificates read in evidence, dated, respectively, April 4, 1872, and April 9, 1872; that the plaintiff, acting upon the faith and credit of said certificates, made a loan to the said Chapman upon the security of the property mentioned therein, then the jury are instructed that, as matter of law, the said certificates were the property of the plaintiff, and that the said Chapman acted as the agent of the plaintiff in procuring the said certificates, and that the plaintiff has a right to maintain his action against the defendant.

It is submitted that the usage set forth in this prayer is abundantly established in all essential particulars, by the testimony of the witnesses, Snyder, Glover, Warner and Darneille. (Record, pp. 13, 16, 17, 18, and 19.) Even had the evidence in regard to its existence been conflicting it should have been left to the jury to determine whether it had been proved.

Renner vs. *Bank of Columbia*, 9 Wheaton, 587;
Jewell vs. *Center*, 25 Alabama, 498:
Furniss vs. *Jones*, 8 Wendell, 266;
Loring vs. *Gurney*, 3 Pickering, 16.

When an established and well-known usage exists in a particular trade, a contracting party is chargeable with notice of it and is deemed to have assented thereto, unless he specially contracts in exclusion of the usage.

Van Ness vs. *Packard*, 2 Peters, 148;
Baxter vs. *Leland*, 1 Blatchford, C. C. R., 526.

IV.

The court erred in refusing to instruct the jury as prayed in exception numbered VI. This prayer was as follows:

If the jury shall find from the evidence that the defendant held himself out to the public as a person skilled in the examination of titles to real estate in the District of Columbia, and that he was employed and compensated as such to examine and report upon the property in question, and that as a result of his examination he gave the certificates in evidence dated respectively April 4, 1872 and April 9, 1872, and if the jury shall further find that on the 13th day of March, A. D., 1872, there was duly recorded, entered and indexed upon the books of the office of the recorder of deeds of Washington County, District aforesaid, the deed in evidence from Leonard S. Chapman to Cornelia W. Beall, then the jury are instructed, as matter of law, that the defendant is guilty of such negligence as will render him liable to the plaintiff; provided they shall have previously found such facts as, under the instructions given, confer upon the plaintiff a right to maintain his action, and provided also that they shall further find that the plaintiff was injured by such negligence.

This prayer, of course, the court could not grant after its previous refusal to concede to the plaintiff a *locus standi* in this cause. That it would have been proper to grant it, had the court held that the plaintiff had a legal right to maintain his action, is abundantly established by the following authorities:

Knights vs. *Quarles*, 4 Moore, 532;

Hart vs. *Frame*, 6 C. & F., 913;
Steamboat New World vs. *King*, 16 Howard, 469;
Chase vs. *Heany*, 70 Illinois, 270;
Gilman vs. *Hovey, et al.*, 26 Mo., 287;
Page vs. *Trutch*, 5 Am. Law Record, 155.

V.

The court also erred in refusing plaintiff's seventh prayer, set forth in exception numbered VII, as follows:

If the jury shall find for the plaintiff, then, in estimating the amount of damages proper to be assessed in his favor against the defendant, they shall take into consideration such sums of money as they shall be satisfied from the evidence were lost to the plaintiff in immediate consequence of the defendant's negligence and unskilfulness in the premises, and they shall include in this estimate not only the sum lent to the said Chapman on the faith and credit of the said certificates, but also such expenses of advertising and court costs as the plaintiffs have been subjected to in attempting to enforce their legal claims against the said Chapman and the said defendant, arising out of the said loan.

This prayer also was rejected; like that next preceding it, it could not be granted after the rulings of the court with respect to the status of the plaintiff. Citation of authorities is scarcely needed to show that it correctly states the rule of damages applicable to this case.

VI.

The court erred in granting the defendant's prayer, set forth in exception numbered VIII, as follows:

And thereupon the defendant, by his counsel, prayed the court to instruct the jury that, upon the whole evidence, they must find a verdict for the defendant, which prayer the

court granted, and accordingly instructed the jury to find a verdict for the defendant.

The court, in granting this prayer, absolutely withdrew the case from the jury, holding that, as matter of law, upon the whole evidence, the plaintiff was not entitled to recover. This was, it is submitted, error. Even conceding that the action is *ex contractu*, and that the plaintiff must show privity, there was, undoubtedly, evidence tending to prove that Chapman, in procuring from the defendant the certificates in question, acted as the plaintiff's agent. The question of agency is a matter of fact, which it is the province of the jury to decide upon, and if there is any evidence tending to prove the authority of the agent, it should be left to the jury to determine the sufficiency and weight of that evidence.

McClung vs. *Spottswood*, 19 Alabama, 165.

It is submitted that error has been shown, and that the plaintiff should have a new trial.

R. ROSS PERRY,
Attorney for Plaintiff.

Supreme Court of the United States.

October Term, 1879.

THE NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA

vs.

WILLIAM H. WARD.

No. 142.

This is a writ of error to the Supreme Court of the District of Columbia.

The plaintiffs brought the action to recover damages of the defendant, under the state of facts following:

The defendant is a lawyer, residing in the city of Washington. Prior to the 4th April, 1872, one Chapman, owning real estate in the same city, applied to the defendant to examine his title to a lot in that city, and to give a certificate of title. On the 4th of April, 1872, the defendant gave him a certificate, as follows:

Lot 55, in Chapman's subdivision of lots in square 364. The title of Leonard Chapman is good, and the property is unincumbered.

WM. H. WARD.
ROBT. H. WARD.

(Rec., p. 5.)

On the same day Chapman executed a deed conveying the said lot to Dodge & Darnielle to secure a note for $3,500, and Dodge & Darnielle, as brokers for Chapman, took that deed and certificate of title, together with a note

for that amount, signed by Chapman, to the plaintiffs, and applied to them for a loan of $3,500, on the deposit of those papers. The negotiation was not completed immediately, but, being delayed a few days, the Bank required from him a further certificate from defendant that the property was still unincumbered (p. 6, Rec'd); and, on the 9th April, the defendant, on Chapman's application, gave a further certificate, as follows:

There is no change since above up to this 9th day of April, 1872, 2 o'clock, P. M., except the following deed has been recorded, viz: L. S. Chapman *et ux.* to R. P. Dodge and P. A. Darnielle, April 4, 1872, (recorded April 9,) trust to secure note for $3,500 at one year after date, interest at 10 per cent., payable to order of W. H. C. Thompson.

F. W. Jones, Att'y at Law.
W. H. Ward.

(p. 7, Rec.)

On that day plaintiffs received these four papers and lent Chapman $3,500. (p. 7.)

In October, 1873, Chapman having failed to pay the note, plaintiffs attempted to sell under the said deed of trust and then discover that Chapman had conveyed the same property by an absolute deed in fee, dated 13th March 1872, to C. W. Beall, and recorded the same day. (Rec., p. 8.) This deed had been casually overlooked by young R. H. Ward, by whom the examination was made. (Rec., p. 8, defendant's testimony.) No shade of suspicion as to the good faith of the Wards in the matter has been suggested, and the single charge is negligence.

There is nothing in the record to show whether any further effort had been made to make the money out of Chapman, or whether he is or not insolvent.

An effort was made to set up by evidence some sort of usage in this District, under which Ward could be held liable, which was objected to by the defendant, and admitted by the Court, "subject to the adoption or rejection of it